Cooke v Cooke

Divorce

1863 - 1864

What follows are corrected text reports[1] of the Court for Divorce action Cooke {nee Briggs} v Cooke, 1863/4, with my added notes about the people involved, legal and otherwise. The original page numbers of the reports are in square brackets, thus [xxx]. Original footnotes carry the number from the book.

I suppose one should not be shocked by the way spouses treat each other, in mid-Victorian England or today, but it does come as a shock when the husband is a clergyman - the Rector of Semer, Norfolk, in fact; James Young Cooke. He seems a thoroughly nasty individual. And we have more than his wife's evidence, we have some of his letters to judge his character. The effect on the children can only be imagined.

The lessons to be drawn from this snapshot of a Victorian marriage, and whether 150 years on we treat our 'loved ones' any better, I leave to the reader.

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1 June 2018
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James Young Cooke

Alumni Cantabrigienses Part II Vol II p. 119

COOKE, JAMES YOUNG. Adm. pens, at ST JOHN'S, Feb. 23, 1822. S. of Charles (1780), clerk, of Semer, Suffolk. B. there 1812. School, Charterhouse. Matric. Michs. 1822. Migrated to Clare, Nov. 14, 1822; B.A. 1826; M.A. 1829. Ord. deacon (Norwich) Oct. 7, 1827; priest, June 8, 1828. R[ector] of Semer, Suffolk, 1838-75. Died 1875. Brother of George (1824), etc., and father of Charles R[ussell]. (1855). (V. B. Redstone.)

1 *Reports Of Cases Decided in The Court for Matrimonial Causes* by M. C. Merttins Swabey, D.C.L., and Thomas Hutchinson Tristram, D.C.L. Vol III from Mich. T. 1862 to Mich. T. 1864. Pub. 1865

[126]

IN THE COURT FOR DIVORCE
17 February 1863. Cooke v. Cooke.[2]

(Before the Judge Ordinary.)

Judicial Separation. — Cruelty. — Condonation. — Lapse of Time. — Agreement as to Children — *Matthews v. Matthews*,[3] distinguished.

From 1851 to January, 1865, a wife received great cruelty at the hands of her husband; besides acts of personal violence, he excluded her from the head of his table, and from the management of the household.

On various occasions between January, 1855, and September, 1856, the wife left and returned to her husband's house; but after January, 1855, refused to return to her husband's bedroom, unless she were replaced in her proper position in the household, which the husband refused to do. In September, 1856, she left, and did not return to her husband's house.

In September, 1857, an arrangement was made, through the medium of friends, that she should pay to her husband a portion of income settled to her separate use, and that he should allow the children from time to time to visit her. She paid the money, but in the early part of 1862 three years had elapsed since the husband had allowed any of the children to visit her, and he then refused to do so, though she was very ill. In July, 1862, she petitioned for judicial separation; the answer of the husband denied the cruelty, and alleged condonation and undue delay.

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2 James Young Cooke married Frances Judith Briggs on 9 April 1834 at Eton, Bucks. He was about 30 years old [B. Semer, Suffolk Ch. Feb 1804], she about 23 [B. Little Burstead, Essex abt 1811].

James Young Cooke was previously married. On 20 Oct 1829 he married Eleanor Mary Francklin at Attleborough, Norfolk. She died at Semer in 1830 aged 24, presumably during childbirth.

3 [1] 1 Swab. & Trist 440; 3 Swab. & Trist. 161; and 29 L. J. 120.

The Court held, that the wife's return to the house showed a willingness to condone; but that she annexed, as she had a right to do, a condition precedent, with which the husband never complied; therefore there was no condonation so as to bar her suit for judicial separation; but that, if there had been, the husband's conduct and demeanour whilst she remained in the house would have sufficed to revive the gross acts of cruelty; less being sufficient to destroy condonation than to found an original suit.

That the whole of the transactions subsequent to the wife leaving the house in September, 1856, grew out of and were connected with the misconduct of the husband, and raised no suspicion that the suit was brought in 1862 with any other object than to obtain that legal protection to which the wife was entitled.

Undue delay in bringing the suit is no plea, strictly speaking, to a petition for judicial separation.
[127]
This was the wife's petition for judicial separation by reason of cruelty.

Dr. Spinks[4] and Mr. J. P. Murphy[5] conducted the petitioner's case.

The Queen's Advocate (Sir R. Phillimore[6]) and Mr. Aspland[7] for the respondent.

4 [1885] Spinks, Thomas, Q.C., D.C.L. St.John's Coll., Oxon, registrar of York district probate registry since 1880, an advocate of Doctors' Commons 2 Nov., 1849, librarian 1861,treasurer 1868, admitted to the Inner Temple and called to the bar 17 Nov., 1858, Q.C. 15Dec, 1866, bencher 25 Jan., 1867, treasurer 187- (2nd son of late William Spinks, of the Tower). Address The Mount, York.
Deaths Mar 1899 Spinks Thomas Age 79 Lewisham 1d p772
Spinks Thomas of "Claverhouse" Upper Sydenham Kent D.C.L., Q.C. died 14 January 1899 probate London 9 March to Louisa Marianne Spinks widow. Effects £21,328 7s. 1d. Re-sworn April 1900 £20,814 7s. 1d. and £25,764 7s. ld.

5 B. 1831 Ireland. Deaths Sep 1907 MURPHY John Patrick Age 76 Camberwell 1d p357. Estate: £239,776 16s.
[1885] Murphy, John Patrick, Q.C. a member of the South-eastern circuit. Matric. Trin. Coll., Dublin, a student of the Middle Temple 24 Jan., 1854, called to the bar 17 Nov., 1856, Q,C. 9 Feb., 1874, bencher Nov., 1876 (eldest sen of Patrick M. Murphy, of Dublin. Q.C. in Ireland). Addresses: Ardmore Lodge, Edderton-by-Train, N.B.; College Road, Upper Norwood, S.E.; 2, Plowden Buildings, Middle Temple, E.C.; Club: Reform Club.

6 Phillimore, Sir Robert Joseph, baronet (1810–1885) Queen's advocate from 1862 to 1867. See Oxford D N B article.

7 Deaths Sep 1870 [d. 26 Jul] Aspland Algernon Sydney Age 61 Clifton 6a p64 Estate: Under £25,000. F/n: ctd below
He was born at Hackney in the year 1809, and, having been educated for the law, practised for

Cur. adv. vult.

The circumstances of this case, which is reported only as to the question of condonation and of delay in bringing the suit, as bearing on the *bona fides* of the petition, are sufficiently stated in the judgment.

The Judge Ordinary: This was a suit for judicial separation on the ground of cruelty.

The petition alleged several gross acts of personal injury inflicted by the respondent, and, in addition, that on many occasions he used gross and insulting language towards her, that, in 1854, the respondent, to insult and annoy petitioner, forced her to give up the housekeeping to her eldest daughter, then only sixteen years of age; that he locked her out of her bedroom, and afterwards compelled her to live in a separate room, by day and night, for a fortnight; that, in May, 1855, when petitioner returned from visiting some friends, he again forced her to occupy a separate bedroom, and a few days afterwards rudely drove her upstairs, and obliged her to live in her bedroom for six weeks; that, in September, 1855, the respondent, to insult and annoy her, again compelled her to leave her place at the head of the table, and never again allowed her to resume it; and that, in December, 1855, she was ordered by her husband to move all her clothes into a miserable little room on the back-stairs, which had been a man-servant's room, and she was compelled to sleep there and make it her bedroom; that, in February, 1856, petitioner, without any apparent cause, was driven away from the breakfast-table by the respondent, and ordered by him to live upstairs [128] again; that, in March, 1856, whilst sitting at tea, in the presence of the family and a gentleman, a friend of respondent's, he declared he would not have petitioner in the room, and endeavoured to pull the chair from under her; that, in September, 1856, being unable to bear longer the continued ill-treatment and insult to which she was subjected, petitioner finally left respondent's house and went to reside with her sister (now Mrs. Mayo[8]), and has ever since resided with her; that, at that time, petitioner forbore to

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some years as a special pleader up to the year 1844, when he was called to the bar at the Middle Temple. He was highly successful in his business, and such was his simplicity of manners, honourable character, sagacity, and clear-sightedness of judgment, that he enjoyed the full confidence of s numerous clients, - *Law Times* 20 Aug 1870

8 Marriages Dec 1861 Mayo Thomas to Symonds Susan Mary Westminster 1a p487 She was the widow of Rear-Admiral Sir William Symonds, and the youngest daughter of the late Rev. John Briggs

institute proceedings against respondent, who, in consideration of petitioner giving up a portion of her own settled income for her children, agreed to allow them to visit petitioner from time to time; that petitioner has always fulfilled her part of the agreement, but that respondent, in 1862, although she was dangerously ill, refused to let her children visit her.

The respondent, in his answer, denied that he had committed the acts of personal violence, or used the language imputed in the petition, and alleged that if he did use any such language, it was reasonably caused, and in answer to provoking and irritating language and demeanour of petitioner (there was not much evidence of abusive language used by the respondent, and none of any provoking and irritating language used by petitioner); that the petitioner's housekeeping and management were negligent and improper, so much so that it became necessary, for the comfort of respondent and his family, that the housekeeping should be taken from her; wherefore, and not on purpose to insult and annoy her, respondent did take the housekeeping from her as alleged (the charges of negligence and mismanagement made by the respondent in his evidence were of the most frivolous description); that as to keeping her out of her bedroom, and compelling her to sleep and live in a separate room, she did it voluntarily and of her own accord; and the same answer was given to the second charge of the same kind; that as to requiring her to leave the head of the table in 1855, she had [129] used insulting and irritating language to respondent in the presence of members of his family, and to put an end to that, and prevent its recurrence, and not to insult or annoy her, he did require her to leave and stay away from the head of the table (there was no evidence to support this assertion); that, on the occasion mentioned in February, 1856, she used irritating and provoking language to respondent in presence of some of their children, wherefore he reasonably required her to leave the room (there was no evidence to support this); that she left respondent's house voluntarily, and it was not caused or rendered necessary by the cruelty or ill-treatment of respondent; that respondent allowed the children to visit the petitioner, in accordance with the agreement between them, until the respondent discovered (as the fact was) that petitioner had encouraged one of respondent's children in habits of dissipation and disobedience to respondent (there was not any evidence of this); that petitioner had condoned the ill-treatment (if any) alleged in the petition; that petitioner (if otherwise entitled to maintain her petition) has been guilty of unreasonable delay in presenting the same.

The petitioner, in reply, denied all the allegations in the answer.

The cause was heard on the 30th of January. Some facts in the history of the parties were not disputed, viz. that they were married on the 9th of April, 1834, and had eleven children, of whom nine are now living,[9] the eldest twenty-five years of age, the youngest twelve. For a good many years they had lived happily together, but in 1851 a change took place. As to subsequent transactions . . .

> (The learned judge here went at some length into the evidence given at the trial; in conclusion, he felt no doubt on the question of cruelty, and as the only points worthy of notice are the questions of condonation and delay, as bearing on the motives of the petitioner in bringing the suit, it is not necessary to detail this. It appeared that after January, 1855, she never returned to the respondent's [130] bed, and in the end of August, or beginning of September, 1856, left the respondent's house and never returned to it; the circumstances of the parties since January, 1855, are stated at some length in the latter part of the judgment.) . . .

After her departure some communications took place between Mr. Wilde[10] and Mr. Josselyn[11] respecting an arrangement for their living apart. The petitioner was entitled to a sum of £6,600 for her separate use, which was secured by a mortgage on the respondent's property, and he insisted that some part of the interest, amounting to one per cent, on the sum secured, should be allowed by her towards the maintenance of the children; and in September, 1857, the following letter was addressed by Mr. Josselyn to Mr. Wilde,and by him handed to the petitioner: —

> "Ipswich, September 15, 1857.

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9 Charles Russell Cooke 1836 - 1892: Elizabeth Susan Cooke Ch: 29 Jan 1838; Frances J Cooke Births Mar 1839 COOKE Frances Elizabeth Cosford 12 p303 Ch: 21 Feb 1839; James A Cooke; John Trevor Cooke Ch: 10 Nov 1841; George Cooke Births Mar 1843 Cooke George Cosford 12 p353; Jeffery Ekins CookeB: 3 Nov 1845; Mildred Cooke Births Dec 1847 COOKE Mildred Cosford 12 p306;Arthur Cooke Births Sep 1850 Cooke Arthur Cosford 12 p354

10 Samuel Francis Thomas Wilde Barrister-at-Law died 4 June 1862 of Serjeant's Inn, and of Hadley, Middlesex. Deaths Jun 1862 Wilde Samuel Francis Thomas W London 1c p57 Estate: Under £50,000.

11 George Josselyn (firm, Josselyn & Son), solicitor, commissioner for administering oaths in chancery, clerk to the Ipswich & Stratford turnpike trusts &c. Tower street Ipswich - *1869 Directory*
Deaths Jun 1888 JOSSELYN George Age 81 Samford 4a p400. Estate: £18,959 7s 9d.

> Dear Sir, — I have seen Mr. Cooke to-day on the subject of our correspondence, and, in addition to what I have before proposed, he authorizes me to say that the one per cent, should be given by Mrs. Cooke amongst the children, or such of them and in such proportions as she pleases, but not to give more than £20 a year to any one child, and to send Mr. Cooke an account of the distribution, to enable him to regulate his money arrangements with the children accordingly.
> That the children shall, from time to time, but not one child to the exclusion of the others, be allowed to visit Mrs. Cooke where she may be residing, provided such residence be not with Mr. or Mrs. Richards, and provided that no personal visiting or intercourse takes place between the children and Mr. or Mrs. Richards; the time of their (the children's) visits to Mrs. Cooke being so arranged as to meet Mr. Cooke's convenience and the general comfort of the children.
> I am, dear Sir,
> yours truly,
> George Josselyn.
> To S. F. T. Wilde, Esq., Hadley, Barnet."

The petitioner returned it with this indorsement:—

> " I agree to the terms and conditions contained in the above letter, and promise to abide by them. F. J. Cooke."

[131]
No agreement was ever executed, but from that time the petitioner regularly paid the one per cent, and in 1858-9 the respondent allowed some of the children to visit her, but afterwards refused, and in 1861 she addressed the following letter to Mr. Josselyn, who communicated it to Mr. Cooke, and then wrote to the petitioner stating Mr. Cooke's determination:—

> "Yarmouth, I. W.,
> July 9th, 1861.
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> Dear Mr. Josselyn, —
> I am sorry to be obliged to trouble you by writing, but I cannot help

asking you to help me in a matter I have very much at heart. I want you to use your influence with Mr. C, and try and persuade him to change his mind and send a different answer to Lady Symonds's invitation to my three daughters. She wrote to him about a week ago, and kindly asked them all three to come and stay here as soon as convenient to him. She has this morning received his answer, in which he says, he cannot let them go without assigning any reason. I do not like writing to Mr. C. myself, but I should be very thankful to you if you would remind him of the terms of the agreement which was made by you and Mr. Wilde between me and my husband in September, 1857, in which these words are used, 'that the children shall, from time to time, be allowed to visit Mrs. Cooke' etc. etc. Since this agreement was drawn up, in 1857, my three daughters have each been allowed to come and stay here only once, though my sister has invited them several times. I have regularly performed my part of the agreement as to paying back the one per cent, of the interest which I receive half-yearly, and I have also strictly complied with Mr. Cooke's wishes in preventing my children from meeting their uncle and aunt Richards, and I think that my husband ought to think himself equally bound to fulfil his part. I think it is a great pity that he should refuse his daughters the pleasure and advantage of a visit to their aunt this summer, especially as Bessie has not been very well lately, and change of air would certainly be good for her, to [132] say nothing of the happiness which it would give them and me to meet again. Do, dear Mr. Josselyn, try what you can do to make him alter his determination and accept my sister's kind invitation for our children. I have always paid for all the journeys of my children when they have come to see me, so that it is no expense to their father.
Once more apologizing for writing to you on this subject, and hoping that you will have the kindness to urge my request,
I remain, etc., F. J. Cooke."

"Dear Mrs. Cooke, —
It fortunately happens that I am going to Semer to-morrow, when I will do what I can to accomplish your wishes.
Yours very truly,
George Josselyn. July 10, 1861.
Mrs. Cooke."

"Dear Mrs. Cooke, — I placed your letter in Mr. Cooke's hands yesterday; he read it, but held out no hope to me that he would comply with your request. Yours very truly,
George Josselyn.
Alresford Hall, July 12, 1861.
Mrs. Cooke."

Early in 1862, Lady Symonds had married Dr. Mayo, and in February of that year the petitioner was staying with Dr. and Mrs. Mayo, at their residence in London, and Mrs. Mayo then addressed the following letter to the respondent: —

"Dear Mr. Cooke, —
I write to you to entreat you to allow Bessie and Frances to come here at once to see their mother, who is, I fear, very ill. You remember that you promised that my sister should see her children from time to time and it is now three years or more since she has seen Bessie and Frances. Her present precarious state makes it of great consequence that she should have the comfort of seeing them, and I cannot think that under these circumstances you will refuse to grant my request. My urgent reason for writing to you to-day is, that last night my sister had a new and very important symptom of her pulmonary affection, namely, a shivering fit.
Yours sincerely,
S. M. Mayo.
February 26, Wednesday."

And received the following answer: —

"Semer, Ipswich;
February 28, 1862.
Dear Mrs. [133] Mayo, — I am sorry to hear Mrs. Cooke is unwell, I hope she will soon be better. I cannot allow Bessie and Frances to go and see her. The reason why I did not let them go as bridesmaids at your wedding[12] was that they should not come in company with Mrs. Cooke. James still keeps his bed. You state, 'you remember that you promised

12 Marriages Dec 1861 Mayo Thomas to Symonds Susan Mary Westminster 1a p487 See f/n above.

that my sister should see her children from time to time;' there can be no mistake about that, because I had it put on paper.
I am yours sincerely,
James Y. Cooke.
To Mrs. Mayo."

On the 1st of March, Dr. Mayo wrote to the respondent as follows:—

56, Wimpole Street,
1st of March, 1862.
Dear Sir, —
I am obliged to you for the letter with which you have favoured Mrs. Mayo in answer to her request that you will allow the Miss Cookes to see their mother in her present dangerous state. For though you do not grant this point, your letter throws light upon the measures which must be adopted in order to obtain that which you refuse. Your letter places you in the following position: — In the same page you refuse to permit your daughters to see their mother in her state of danger, not having seen her for nearly three years; and you admit to Mrs. Mayo that 'you had promised to do so from time to time.' You have also received pecuniary advances from your wife in consideration of this promise. It is for you to reflect gravely on the view which the law may take of this procedure on your part. With the most anxious wish to consult your interests as well as your wife's, I shall take an opinion on the point.
Believe me,
yours faithfully,
Thomas Mayo,"

And the respondent merely acknowledged the receipt. On the 8th of May, 1862, the respondent wrote the following letter to the petitioner: —

"Semer, Ipswich, 8th of May, 1862.
Madam, —
James is now pronounced by Mr. Grower to be in health, although he is still a little lame. You have been the means of causing this protracted case, and it is the most fortunate thing he was not crippled for life. The medical bills and travelling [134] expenses amount to £35. 0s. 6d., which

I must call upon you to pay. James has tried to impose on the sick fund, but I prevented it; what he has done in that way previous to his coming home I must refer the party to you for repayment.
James Y. Cook.
To Mrs. Cooke.
Send the cheque at once and have the bills settled."

To which Dr. Mayo replied as follows: —

"Sir, — Mrs. Cooke duly received your letter of the 8th of May, but was at that time too ill to enter upon the disagreeable topic which it brought before her; namely, your demand that she should pay the expenses of children whom she was not allowed by you freely to see. I now beg to inform you that she declines to submit to your demand, as contained in your first letter, of £35. To the letter of the treasurer of the sick fund at Newcastle she has already replied.
I am, Sir, your obedient servant,
Thomas Mayo.
P.S. I enclose a copy of the letter written by Mrs. Cooke to the treasurer of the sick fund."

On the 9th of June the respondent wrote to Dr. Mayo, enclosing a letter for the petitioner: —

"Semer, Ipswich, 9th of June, 1862.
Sir, — I addressed a letter to Mrs. Cooke at your residence about a month since, to which I have had no reply. If Mrs. Cooke is not residing with you I request that the enclosed may be forwarded to her. I am, Sir, your obedient servant,
James Y. Cooke.
Dr. Mayo."

"Semer, Ipswich, January 9th, 1862.
Madam, — I want the money for those medical bills for Jemmie, and I want to know whether you have paid back to the sick fund at Stephenson's.
James Y. Cooke. To Mrs. Cooke."

In July, 1862, the suit was commenced, and the petitioner admitted that she should not have instituted it had there been no dispute about seeing the children according to the agreement, and that she is not in fear of her husband coming and beating her now, and has not considered such acts of violence probable since she left his house. . . . The respondent also put in evidence several letters written by the petitioner since the [135] separation, with what particular object I know not, unless to show that she addressed him as Dear James, and sometimes subscribed herself his affectionate wife; he certainly cannot be accused of writing to her in a similar strain. ... As to the tracts which I take to have been proved, there is no nice or doubtful question whether they amount to what the law calls cruelty — in my judgment they establish cruelty of a very aggravated and unmanly character; but it may be asked, if the story of the petitioner and her witnesses be true, why did she not bring forward her charges before Mr. Wilde and Mr. Josselyn? It seems to me that this silence is very easily accounted for: those two gentlemen met for the purpose of effecting a reconciliation; the wife was willing to be reconciled if restored to her proper position as a wife at the head of her table, and in the management of household affairs; would the object in view have been advanced by exposing to them the cruel personal injuries that had been inflicted upon her? Assuredly not, and I can well understand that a lady who contemplated remaining in her husband's house would shrink from making known to any person the grievous indignity to which she had been subjected.

The next question the Court has to deal with is that of condonation. Did the wife condone the acts complained of? It is unnecessary to go further back than the 28th of January, 1855; it appears by the evidence that the wife on that night returned to her husband's room, but that it was not voluntarily, it was in consequence of his violently insisting upon it in such a manner that the daughters feared for her life, and as soon as practicable she left her home. I cannot treat that sort of forced cohabitation as proving condonation. In *Popkin v. Popkin*,[13] the last act of cruelty alleged was in December, 1790, and the wife quitted cohabitation on the 6th of January, 1791, and Lord Stowell considered that it was soon enough to repel the suggestion of condonation. But she returned to her husband's house on the 12th of May, [136] and remained there till the month of March in the following year. Her voluntary return shows at least a willingness to condone; but was that absolute or conditional? The petitioner states, and in this she was not contradicted, that she refused to return to her

13 1 Hagg. Sup. 768 (note)

husband's bed unless she was reinstated in all respects in the position that a wife should occupy. Now, on her return a separate bedroom was prepared for her, and although she was for a short time allowed to take her meals with the family, she was not allowed to sit at the head of the table, or to interfere in the management of the household, and towards the end of May, in consequence of some imputed interference, she was compelled to live entirely upstairs.

In the month of June Mr. Wilde and Mr. Josselyn met, and for some time afterwards she was better treated, and allowed to sit at the head of the table, but not to interfere in the management of the house; and in September, upon some alleged interference by giving some trifling order, the respondent directed a small bedroom, which had formerly been occupied by a man-servant, to be prepared for her, and there she slept, occupying the spare room by day, until she left home on the 26th of March, for the following reason: —

On the 25th a gentleman came to visit the respondent, and as the spare room was wanted for him, she went downstairs to dinner. In the evening, when she was preparing to make tea, the guest being then present, the respondent came up to her, and ordered her to retire, for he would not have her there; and taking hold of her chair, shook it so violently, that if she had not moved she must have been thrown down. Next morning she told him she would not stay in the house to be subjected to such insults, and he sent her to Hadley in his dog-cart, whence she travelled by railway to London, and went to stay with her sister, Lady Symonds who had then become a widow. It seems to me that there never was any perfect condonation; it was in her power to grant or refuse it, and as she annexed a condition to her offer to condone, which was [137] never complied with, I think there never was condonation that could be pleaded as an answer to her suit. In *D'Aguilar v. D'Aguilar*,[14] Lord Stowell seemed to think that a return to matrimonial cohabitation was necessary to a complete forgiveness; and in *Snow v. Snow*,[15] Dr. Lushington intimates a similar opinion; here there was no such return proved, nor was there any ground for presuming it; the contrary was clearly established. But if there had been, I think his subsequent conduct was sufficiently threatening to revive the offences condoned; for, according to *Wilson v. Wilson,*[16] *D'Aguilar v. D'Aguilar*, and many other cases, much less is sufficient to destroy condonation than to found an original suit.

14 1 Hagg. Sup. 782
15 2 N. C. 16, Sup.
16 6 N. C. 291 and 6 Moo. P. C. 484

On the 26th of August she returned again to her husband's house. When they met he would not shake hands, and she found every bed occupied, and therefore slept in her daughter's room. Next day he said he would not allow that, and then she slept in Miss White's room; he objected to that, and then, as the little room was vacant, it was prepared for her; but he said she should not sleep there, and ordered the sheets to be taken off; but she slept there without any. He then said that if she lived there she should return to his room, but she refused unless she was treated as a wife, and restored to her proper position downstairs, and in the management of the house. He then became very insulting, and called the servants to hear him find fault with her, and said that her conduct and management were such that he would not bear it any longer.

On the following Sunday he burst into the little room where she was dressing to go to church, and said that he would not allow her to have that room any longer; to which she replied that she should only require it one night more; and would then leave his house, which she accordingly did, and never returned. This last return to her husband's house again shows that she was willing, and in effect offered, to condone; but she annexed a condition precedent which he [138] would not perform, and as he refused even to shake hands with her, and again treated her with contumely in the presence of her servants, I think she was fully justified in thinking that cohabitation with him would be unsafe. I am therefore of opinion that, on this occasion, there was no perfect condonation, and even if her return to the house could be so considered, she had sufficient reason for leaving it again.

The last plea of the respondent remains to be considered, viz. that the petitioner had been guilty of unreasonable delay in presenting her petition. The plea seems to be founded on the 31st section of the Divorce Act, 20 & 21 Vict. c. 105, which applies to suits for dissolution of marriage, and not to suits for judicial separation; and in this suit, strictly speaking, it is no plea. Mere lapse of time is not of itself a bar to the suit, but it may be offered as a circumstance to be taken into consideration, and, combined with others, may be a sufficient reason for dismissing such a petition. In this case it was relied on in connection with the petitioner's avowal that, but for the refusal to let her see her children, she should not have instituted the suit, and that, when living apart from her husband, she was not afraid of personal violence; and *Matthews v. Matthews*,[17] [18] was cited as

17 1 Also 3 Swab. & Trist. 360.
18 1 Swab, and Trist. 449, and 29 L. J. 118,

an authority for dismissing the petition.

That case, having been decided on appeal, must give the law to this Court until it has been overruled by some competent authority. The learned judges who gave judgment in that case appear to have arrived at the conclusion that the wife was not sincere in asserting that she feared her husband's violence; and that opinion was founded on the weakness of the evidence of personal injury, the lapse of time, and an apparent pecuniary motive for the proceeding, which induced them to think that the Court was asked to pronounce a sentence of judicial separation, not on account of any evil felt resulting from a habit of cruelty, but with a view to some other [139] object having no relation to it. In the case now before the Court there can be no doubt as to the charge of cruelty; no doubt that, as long as the husband manifested the same want of affection, and the same determination not to allow her the proper position of a wife in his house, she could not safely co-habit with him; no doubt that she left him in consequence of his cruelty. True, she abstained, for reasons that may well be imagined, from bringing her wrongs before the public, and was content to submit to the separation, so rendered necessary, provided he would allow her the consolation of having sometimes the society of her children. That consolation was afterwards withdrawn; she could no longer have it unless she returned to cohabitation with her husband. No part of his conduct or his letters since the separation evinced any more kindly feeling towards her; and, therefore, I believe she was sincerely afraid of further violence, and, in order to obtain that to which, as a wife and a mother, she was entitled, and which she could only have by returning to a cohabitation that was dangerous, or by an appeal to this Court, she adopted the latter course. I find in all this no symptom of a scheme to promote or assist any purpose that has no relation to the ill-treatment that she has suffered and the peril to be encountered by a renewal of co-habitation. It appears to me, therefore, that the case of *Matthews v. Matthews* is plainly distinguishable from the present, and that I am bound to pronounce the decree prayed for.

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[246]

8 July1863.

(Before The Judge Ordinary, Wightman, J., and Channell, B.)

Cooke v. Cooke.

Judicial Separation. — Condonation of Cruelty.

This was an appeal by the husband from a judgment and decree of the Judge Ordinary, by which he decreed a judicial separation, on the ground of the husband's cruelty (see ante).

The case was originally tried by the Judge Ordinary without a jury, and the appeal was argued by the Queen's Advocate and Mr. Aspland for the appellant, and by Dr. Spinks and Mr. J. P. Murphy for the respondent, on the notes of the evidence as taken by the learned Judge Ordinary.

In the following short judgment the Full Court confirmed in all points the judgment appealed from, and appear to have agreed with and adopted all the remarks of the Judge Ordinary on the different questions raised.

Judgment was delivered by Wightman J.: This is an appeal from the judgment of the Judge Ordinary to the Full Court, in a case in which he had pronounced a decree, in favour of the present respondent, for a judicial separation from her husband on the ground of cruelty.

The appellant in his petition stated four grounds for reversing the decree and dismissing the suit: first, that the alleged cruelty was not sufficiently established; secondly, that if it was, it had been condoned; thirdly, that there was unreasonable and unnecessary delay in instituting the suit; and fourthly, that the petition was brought for collateral purposes, and not for the protection of the person of the wife.

We are of opinion that the appellant has failed in making out either of the above grounds of objection to the decree. It is not necessary to state in detail the circumstances which were proved to establish a case of cruelty, but we are clearly of opinion that the evidence was abundantly sufficient to warrant the decree on that ground.
[247]
And the next question is, whether the wife had condoned the cruelty which we think had been sufficiently proved; and we are of opinion that there was no such condonation as would afford an answer to the suit. The wife appears to have been willing to condone, provided she was treated by her husband in the manner she had a right to expect, if she returned to live and cohabit with him.

She was not, upon her return to him, treated by him in the manner she ought to have been; but, on the contrary, her husband's behaviour then was such, that she might well apprehend that it would not be safe for her to continue to live with him; and, upon non-compliance with that which was a condition of condonation, the offences said to have been condoned were revived. And the second ground of objection also in our opinion fails. But it is said that there was unnecessary and unreasonable delay in prosecuting the suit, and that, in truth, the object of the suit was not to protect the person of the wife from violence, but to enable her to have more free and frequent access to her children. The case of *Matthews v. Matthews*,[19] is clearly distinguishable from the present, for the reasons given by the Judge Ordinary in his judgment in this case; and we are of opinion that the reluctance of the wife to prosecute the suit against her husband is no bar to her proceeding, she being willing to have lived with him, if she could have done so with due regard to her personal safety; and that as she could not have such access to her children as she was entitled to have, unless she either returned to live with her husband, or was separated from him by judicial sentence, and her evidence showed that she had reasonable ground for apprehending personal danger, if she did return to him, we are of opinion that she was well warranted in prosecuting her suit, though one object may have been that she might have access to her children, from which she was debarred by her fear of personal violence, if she returned to live with him. Upon the whole, [248] our judgment is in favour of the respondent, Frances Judith Cooke.

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[374]

14 July 1863

Cooke v. Cooke.

Judicial Separation for Husband's Misconduct. — Custody of an Idiot Child. — Jurisdiction of Court.

Where a wife had obtained a decree for judicial separation by reason of the husband's misconduct, the Court refused to give her the custody of one of the children of the marriage, who was an idiot and of the age of twelve years, on

19 1 Swab. & Trist. and 3 Swab. & Trist., 29 L. J. 118.

the ground that the Court would only deprive the father of the custody of his child in favour of the innocent wife, when it was for her solace that she should have such custody.[20]

In this case the Judge Ordinary had pronounced a decree of judicial separation on the petition of the wife by reason of the husband's cruelty. This decree was affirmed on appeal to the Full Court. An application was now made on behalf of the petitioner (the wife) for the custody of one of the children, a boy of the age of twelve years, who had been an idiot from his birth,[21] in order that she might place him in an asylum.

Dr. Spinks appeared for the wife: It was a matter entirely for the discretion of the Court.

The Queen's Advocate (Sir R. Phillimore, Q.C.) for the husband.

The Judge Ordinary: I have been in the habit of considering the question of the custody of children with reference to the merits and demerits of the husband and wife. Where the wife has been the innocent party, I hold that she ought not to be deprived of the solace of having the custody of her children.
[249]
The question raised in reference to the custody of this child would involve the Court in considerations which are foreign to its jurisdiction. I think this is a question which would more properly belong to the Court of Chancery.

The Queen's Advocate stated that there was an affidavit of a gentleman, who had been the medical attendant of the family for thirty years, from which it appeared that the child was under proper care.

The Judge Ordinary: I decline to interfere.

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20 Arthur may have been in his father's 'custody' but he was not living with him. In the 1861 Census Arthur was living in the residence at Sagers Green, Semer of Mary Lemon [aged74] and her three daughters. In 1871 he was still there, Mary having died in 1870 - her daughter Elizabeth [then 58] being head of household. [Elizabeth was a servant at the rectory at the 1851 Census.] Did his mother know this? She wanted custody in order that Arthur could have professional care in a suitable environment. Did the court, through lack of information, act 'in the best interests of the child'? What did 'proper care' mean on p [249]. Poor Arthur as noted elsewhere died in 1875.

21 Births Sep 1850 Cooke Arthur Cosford 12 p354 Deaths Jun 1875 Cooke Arthur Age 24 Cosford 4a p321

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[374]
March 8 & 15.

Cooke v. Cooke.

Cooke Wife's Petition by Reason of Cruelty.— Taxed Costs.— Item disallowed.

The Court will not interfere with the discretion of the Registrar in respect of particular items allowed or disallowed on taxation, unless it can be shown that the taxation proceeded on an erroneous principle.

This was originally the wife's suit for judicial separation by reason of the husband's cruelty, in which she obtained a decree, and her costs had been taxed against the husband.

On the 8th of March, Dr. Spinks moved the Court to order the registrar to review certain items of the wife's costs (specified in the Registrar's report hereunder), which had been disallowed on taxation as against the husband.

Cur. adv. vult.
[375]

On the 17th of March, the sitting registrar, by direction of the Judge Ordinary, read the following report from the registrar who taxed the bill of costs: —

The further bill of costs of the petitioner, filed 11th of January, 1864, was taxed according to usual practice as between party and party, and in the presence of the agents of petitioner and respondent, on the 8th of February, 1864.

1. Instructions to counsel to advise on answer. Never allowed. The counsel has a copy of the petition and answer, and no further instructions are held to be necessary for the purpose of enabling him to advise as to the sufficiency of answer.

2. Journey to Seamer and thence to Bilderstone and other places for the purpose of getting evidence in support of petition for custody of children and expenses.

The only affidavits filed in support of this petition were those of the petitioner and her two daughters (both of whom were resident in London), and of Emily Butcher, resident at Bilderstone, therefore the journey of the agent proved useless, except for the purpose of procuring this last affidavit. It is unusual when a case is heard upon affidavits to allow more than 6s. 8d. for instructions for each affidavit, and in case the deponent resides at a distance, the expense of employing an agent on the spot to read over and settle the affidavit with the deponent, and to have her sworn. These expenses are allowed in pages 2 and 8 of the bill as regards the affidavit of E. Butcher; and there being no other evidence used on the motion for custody of children to which the journey in question could apply, the expenses of the same were disallowed.

3. Instructions and fee to counsel to settle affidavits, and advise if sufficient. It is contrary to the usual practice to allow for settlement of affidavits by counsel or advice as to their sufficiency.

4 and 5. Drawing and copying observations for counsel on motion for custody of children, and on motion for alimony. [376] The only allowance made for motions, according to usual practice, is for a case or statement for the Court, which, if necessarily exceeding seven folios in length, is by the table of fees limited to 10s., and for a copy of that case or statement, and of all documents referred to in it, for counsel.

Observations in addition to those in the case for motion are therefore disallowed.

6. Attending in Court, 21st of April, 1863, when motion for alimony was directed to stand over. This motion was for an order for permanent alimony, and it appears by the minutes that it was directed to stand over until the appeal had been determined. The notice of the appeal had been served on the petitioner and filed in the registry on the 9th of March, 1863, and as no order for permanent alimony could be made pending the appeal, and the motion was therefore premature, the attendance was disallowed.

7. Attending in Court, 21st of April, 1863, on motion for custody of children. This motion was also directed to stand over until the appeal had been determined, and being premature, the attendance was disallowed.

8. Conference with Dr. Spinks, when he advised that petitioner might safely go

to hearing on the present evidence and his fee. No conference with, or advice of counsel as to sufficiency of affidavits in support of a motion is usually allowed on taxation between party and party, and as it did not appear that there was any necessity for this conference to except it from the usual practice, it was disallowed.

9. Conference with Dr. Spinks, when he advised a motion for an interim order for access to children, and motion for same. This motion, 30th of June, 1863, failed. It appears by the minutes that the judge refused to make any order. Under these circumstances, all expenses of the motion and of the advice which led to it were disallowed as against the respondent. The adjourned motion for custody of children was afterwards (8th of July) heard, and an order made upon it, [377] but the expenses of that motion are fully allowed for when it was first brought on (see page 4 of the bill), except the attendance in court of the practitioner, which is allowed for on the 8th of July (page 7 of the bill).

10. Attendance in Court and refresher to counsel on adjourned motion for custody of children, 14th of July, 1863. This appeared to be a renewal of the adjourned motion, which had in fact been disposed of on the 8th of July; but whether the object of it was to procure any alteration of the order then made, or any additional order, it failed, as the judge refused to make any order on the application, and therefore the attendance and refresher were disallowed.

11. Refresher to counsel on renewing motion for alimony. This motion was premature when originally made. If the fee to counsel had been paid when the motion could properly have been disposed of, — namely, after the decision on the appeal on the 8th of July, no refresher would have been payable, therefore it was disallowed.

12. Observations for counsel and conference on renewal of motion for alimony. Nothing had occurred to affect the motion for permanent alimony in the interval since the adjournment of it. And these expenses were therefore disallowed.

Motions for permanent alimony: —

2lst of April, 1863. — Ordered to stand over until appeal had been determined.

14th of July, 1863.— Order postponed.

Motions for access to and custody of children: —

21st of April, 1863. — Ordered to stand over until appeal had been determined.

30th of June, 1863.— No order.

8th of July, 1863. — Ordered, that the petitioner have the custody of her youngest child.

14th of July, 1863.— No order.

Charles J. Middleton,[22] Registrar.

[378]

The Judge Ordinary said: I see no need to interfere with the taxation of the registrar in this case, and I must take the opportunity of saying, that it is an inconvenient and unusual course to bring before the Court certain items dealt with on taxation of costs, unless it can be pointed out that the principle upon which the taxation proceeded is wrong.

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[663]

22 November 1864

Cooke v. Cooke and Allen.
Dismissal of Husband's Petition. — Wife's Costs.

Where the husband's petition is dismissed, and the wife's costs of the hearing exceeds the sum secured or paid into the registry to meet them, the husband is liable to pay the balance.

Application for the balance should be made on summons, and not on motion.

This was the husband's petition for dissolution of marriage. The respondent denied the adultery, and also charged the petitioner with wilful neglect and misconduct conducing to the adultery, and with separation without reasonable excuse.

22 Deaths Mar 1894 Middleton Charles John Age 84 Windsor 2c p311 Estate: £33,281 4s 4d

The issues came on for trial on the 14th of May, before the Judge Ordinary and a jury.

The witnesses called for the petitioner declined to give evidence, unless their expenses were first paid; and as the petitioner's solicitor was not then able to tender such expenses, no evidence was offered. A verdict was accordingly taken for the respondent, and the petition was dismissed, with costs.
[604]
The petitioner had given security for £55, to meet the respondent's costs of the hearing. These had since, on taxation, been found to amount to £71.

Dr. Swabey, on behalf of the respondent, now moved the Court to order that the petitioner should pay to the respondent £16, the difference between the taxed costs of the hearing and the sum for which security had been given. As the petition was dismissed, the respondent is entitled to all the costs of the hearing. He also asked for the costs of the motion.

The Judge Ordinary: The dismissal of the petition, with costs, entitled the wife to all the costs of the hearing, although they might exceed the sum for which security was given. A motion was, therefore, unnecessary, and I cannot allow the costs of it, but merely the costs of a summons.